IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6977 OF 2004

Shrirang Atmaram Nikam)
Age 45 years, Occ.Service)
Residing at above Bhave & Co.)
3rd Floor, Station Road, Thane.)..PETITIONER

Versus

1. District and Sessions Judge,)
Thane having office at Thane)
2. The Registrar, District Court)
Thane having office at Thane)
3. The State of Maharashtra)..RESPONDENTS

Mr. S.M. Oka with Mr. Ambar Joshi, for the Petitioner
Mr. R.M. Patne, AGP for Respondents.

CORAM: F.I. REBELLO & S.P.KUKDAY, JJ.
DATE : 18th March, 2005

ORAL JUDGMENT (PER F.I. REBELLO, J):

. Rule. Heard forthwith.

2. The petitioner is working as a Bailiff in the subordinate Court. He was appointed vide office order No.114 dated 17th April, 1989. He was confirmed by office order No.384. It is the case of the petitioner that since then he is working satisfactorily as a Bailiff and is discharging his duties and responsibilities to the satisfaction of all concerned. Till date he has not received promotion. It is his further case that on completion of 12 years of service in terms of G.R. he would be entitled for assured promotional scale or time bound promotion scale. The petitioner, however, was not

given the benefit of the said G.R. It is the case of the petitioner that he is not aware of the reasons as to why he was not given the benefit. On 30th October, 2003 he was intimated by communication of the adverse remarks in the confidential report from 1st April, 2002 to 31st March, 2003 which are as follows:-

1. Relations with colleagues & Public : Unfriendly

2. Fitness for Promotion. : Unfit

The record does not show whether the petitioner has represented against the adverse C.R. It is, however, the petitioner's case that on retirement of Head Bailiff in his place he shouldered the responsibilities for the months of April and May, 2004. The petitioner's grievance is that by communication of 15th May, 2004 he was held ineligible for the benefit of promotional pay scale with effect from 1st April, 2001 in accordance with the G.R. dated 28th July, 2001. It is this order which is the subject matter of the present petition.

3. The petitioner was employed on 17th April, 1989 and in these circumstances he would ordinarily be eligible to be considered on completion of 12 years after 1st April, 2001. The adverse remark which is communicated is from 1st April, 2002 to 31st

March, 2003. It is the case of the petitioner, therefore, that the adverse remark should not be considered. It is further submitted that what the respondents have to consider was whether he was eligible for promotion and should have been considered for promotion. The mere fact that for one year he may have been marked average by itself cannot result in denying to the petitioner the benefit of the time bound promotion scale.

4. On behalf of the respondent a reply has been filed by the Registrar, Legal, High Court, Appellate Side. It is pointed out that no employee is entitled to promotion as of right after completion of 12 years in service. It is then pointed out that the benefit of assured promotional pay scale is given as per criteria laid down in para.2(5) of the G.R. dated 20th July, 2001 and the criteria mentioned in para.580(ii) of the Civil Manual 1986. It is set out that the petitioner has not been granted benefit of the scheme since he does not fulfill the criteria. The benefit of the scheme is given only if the entire service record and confidential report for the last 5 years are found satisfactory by the members of the Advisory Committee. As the record was not satisfactory he was not considered. The adverse remarks though were communicated, the petitioner did not represent against the same for expunging the same. It is denied that the order passed by the respondent No.1 suffers from any non-application of

mind.

5. By the order of this Court dated 4th March, 2005 we had asked the respondents to file additional affidavit as to why average has been treated as adverse. Pursuant to that an Additional reply has been filed in which it is set out that pursuant to the Government Resolution dated 1st February, 1996 which has been adopted by this Court the manner of writing annual confidential reports has been set out. In terms of the said G.R. average is treated as adverse and hence is to be communicated.

. Rules have been framed in the matter of promotion of employees in the subordinate services. Rule "(c)" reads as under:-

> (c) While selecting an employee for promotion, the District Judge shall take into consideration:-
>
> (i) The entire service record, and more particularly annual confidential reports for the previous 5 years;
>
> (ii) Leave and punctuality record for the previous 5 years;
>
> (iii) Special reports called from the officers under whom the employees within zone

of consideration are currently working;

(iv) Nature of duties of the promotional post vis-a-vis the abilities of employees within zone of consideration.

In terms of the G.R. dated 1st February, 1996, Item 33 reads as under:-

"33. All the remarks such as average, below average, so-so, poor or the remarks of such meaning or bad remarks than these should be treated as adverse and the same should be informed in writing to the concerned.....".

We then have the Government Resolution dated 20th July, 2001 which is the G.R,. in the matter of time bound promotion scheme. Para. 5 of the said G.R. reads as under:-

"Since under this scheme the pay scale for the post of promotion is made payable it will be necessary to comply with all the requirements such as the prescribed qualification for the post, eligibility seniority, qualifying examination, departmental examinations as well as the procedure laid down for the promotions, wherever the pay scale in the schedule enclosed with this Government Resolution will be sanctioned in such cases the eligibility

should be determined on the basis of confidential report."

Para.8 of the said G.R. reads as under:-

"The employees who have refused the regular promotions and the employees who are held not eligible for the regular promotions shall not get benefits of this scheme. Those employees who are given the benefit of the higher pay scale under this scheme and who have refused the regular promotion and who are held to be ineligible for the regular promotion shall be withdrawn. However, the monetary benefit of the pay scales given to them will not be recovered."

[Both paragraphs are reproduced as per the English Translation which has been furnished].

A reading of these paragraphs, therefore, would make it clear that it only those employees who are held not eligible for regular promotion who will not get the benefit. In other words an employee either on account of not possessing the qualifications, experience or having a bad service record namely adverse entries would not be eligible to get the benefits of the scheme. In the case of promotion whether by selection or based on seniority-cum-fitness what is always considered is

the number of posts and the zone of consideration. As an illustration if there be one post, depending upon the G.R. 3 persons may be considered. All the 3 employees may be having good record, but still as the vacancy is only one, the candidate in the case of selection plost, having the best record would be selected. It does not mean that the other candidates are not fit for promotion. The test, therefore, is not whether a candidate would be promoted. The test is whether a candidate is eligible.

6. From the record as we have now noted the petitioner herein had been graded as Good for 3 years namely 1997-1998, 1998-1999 and 2001-2002, positively good for one year namely 1999-2000 and average for the year 2000-2001. Even if average is taken as adverse entry, even then for 4 years the petitioner has 3 good and one positively good. Based on that the petitioner would have been in the field for consideration. In other words he would still be eligible. The fact that in 5 years for one year the petitioner had adverse entry by itself will not make him ineligible. All that would happen is that between him and other candidates, his rank in merit would be lower comlpared to those who are placed above him on merit. This clearly cannot be disqualification, for consideration for the time bound promotion scheme.

. It could be understood if a bench mark had

been provided and considered for the purpose of granting time bound promotion scheme. As an illustration, a bench mark could be as under. If a candidate for 5 years has atleast good for 3 years than that would be the bench mark for consideration. In cases of assured career scale for the Civil Judges to get A.C.P. the bench mark fixed is average. We, therefore, see no reason as to why a similar bench mark or another comperable bench mark should not be adopted for consideration in the future for the purpose of assessment for time bound promotion scheme. Until such bench mark is fixed, for consideration of A.C.P. for the staff of Courts and Tribunals subordinate to the High Court in the State of Maharashtra for granting A.C.P., it would be sufficient if on consideration of the C.Rs. for the last five years, a candidate has at least 3 C.Rs. where he is rated as good and satisfies other requirements in terms of the Government G.R.

. The Registry to place the matter before the learned Chief Justice for necessary direction.

7. On the facts of this case, however, we find that the petitioner was eligible. He meets the desired bench mark for consideration for promotion and as such the petition will have to be allowed. In passing we may also mention that though average is considered to be adverse, at the highest that is to enable the employee to improve himself. Average,

therefore, by itself cannot be by itself adverse or a ground for disqualifying an employee for consideration.

8. With the above observation, the following order:-

. Rule made absolute in terms of prayer clauses (a) and (b) subject to the direction that no interest would be paid as sought for in terms of prayer clause (b). The order to be complied with within 8 weeks from today. There shall be no order as to costs.

(F.I. REBELLO, J.)

(S.P. KUKDAY, J.)